PROCEEDINGS

of a

MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS

held at

THE WAR CRIMES COURT, HAMBURG

SATURDAY, 20th OCTOBER, 1945

upon the trial of

Kapitanleutnant HEINZ ECK

Leutnant zur See ADOLF HOFFMANN

Marine Stabsarzt WALTER WEISSPFENNIG

Kapitanleutnant (Ing) HANS RICHARD LENZ

Gefreiter SCHNEIDER

PRESIDENT:

Brigadier C.I.V. Jones, CBE, Commander 106 AA Bde.

MEMBERS:

Brigadier R.M. Jerram, DSO MC.

Commodore D. Young-Jamieson, Royal Navy.

Captain Sir Roy Gill, KBE, Royal Naval Reserve.

Lieutenant-Colonel H.E. Piper, Royal Artillery.

Captain E. Matpheos, Royal Hellenic Navy

Commander N.I. Sarris, Royal Hellenic Navy.

JUDGE ADVOCATE:

Major A. Melford Stevenson, KC, Deputy Judge Advocate
Staff, Judge Advocate General's Office.

FOURTH DAY

At 1000 hours the court reassembles pursuant to adjournment, the same President, members and Judge Advocate being present.

The Accused are again brought before the court.

THE JUDGE ADVOCATE: Dr.Rodiek, it is for you, I think, to address the court first.

DR.TOLSEN Yes. I am now going to open the concluding speech for Kapitanleutnant Eck and I want to plunge into the facts at once.

Which order had been issued by the commanding officer ? We have not been able, during the evidence, to get at the exact words which were used. One point seems clear to me. There was issued an order to get hand weapons ready. A further basis for the answer to my question may be the statement of Lens. In this statement it is said: "I then heard that the captain had decided to eliminate all trace of the sinking. I assumed from this that it was intended to kill the survivors".

As my learned friend Major Lennon has pointed out, there are two possibilities to explain this sentence. It may be explained in this way, that it was said by Eck himself: "We have to kill all survivors"; but there is the other possibility that he did not use such words, but it was pretty clear for Lens that, as a consequence of the sinking and the eliminating of all traces of the sinking of the ship, it was necessary even to kill the survivors, because they had no possibilities left to rescue their lives. I think the second possibility would be the right one. In the statement of Lens it is expressly said that he replied that he was nevertheless determined to eliminate all traces of the sinking.

Could Eck be interested in killing the survivors themselves directly? What was the reason for his decision ? I think that the evidence has put it clearly to the court that his reason was the fear of being betrayed by the traces of the sinking, if there were any survivors swimming in the sea and they betrayed his boat to air reconnaissance. I do not think such a thought could have occurred to Eck. He was fully aware of the fact that when he destroyed the rafts which might betray his boat there was almost no chance left for the survivors, and this consequence he was ready to accept.

What targets were fired at ? We have heard the evidence, and it is quite clear to me that there were shots at pieces of wreckage, but there were also shots at rafts; that is not to be denied. Why were there shots with machine guns ? Schnee, who has been in the witness box as an expert witness, has told the court that a machine gun was a weapon which could be used, and which should be used, for sinking rafts. It was not possible to use a cannon for this end.

I am not experienced in these weapons, but in the court there are officers of the Navy and I think that I can leave this question to them, and I can leave it to them to decide if Captain Schnee is right when he said that a machine gun must have been used in such a case.

Were there men on the rafts when the shots were fired at them ? I think the defence has to admit that, but I do not think there were men on every raft. That will be clear if you go through the different affidavits of the Greek survivors. I think that when a ship is blown up by two torpedoes and sinks in two minutes, almost the majority of the crew will have perished at once, and there would have been only a very few survivors at all.

How can it be explained that none of the accused saw any living man on a raft ? I think the answer is not so very difficult. When the shooting was started, I think that the survivors who were on the rafts

immediately tried to escape the bullets; they bent down, they lay, they went under the benches, and they might not have been made out by the accused in the darkness of the night.

On the other side, there might be a second reason why they did not make out any men on the rafts. You might think of the possibility that when the shooting was started most of the survivors tried to escape the bullets by jumping into the sea.

What would have happened if Bok had not destroyed the rafts and if he had gone off with his boat from the scene of the sinking ? We have heard Schnee, and Schnee has told the court that the distance which the boat might have travelled in one night was not sufficient to bring him out of the circle round the scene of the sinking in which the danger for his boat and his crew was almost as present, as immediate and as imminent as on the scene itself.

Would the traces of the sinking have been discovered on the following day? The circle in which the U-boat had to be was so small that the chase which could be concentrated on this single U-boat almost with certainty must succeed.

Had Bck to calculate that the traces of the sinking would be discovered on the following day ? I think yes. The court may think of the U-boats which have been lost in the months previous to the sinking. Think of U-boat 847, 848, 849 and 850. All those U-boats had been commanded by the most experienced U-boat commanding officers which the German Navy had at its disposal. All the U-boats about which I have spoken were boats of the same type as Bck commanded now. Bck was in the zone between Freetown and Ascension, and that was a zone, as everybody knew, which involved the greatest danger of being discovered at any time. I think for Bck the question was this: "If I do not destroy the rafts and eliminate any traces of the sinking of the ship, I am quite sure that I myself, my boat, and my crew, will be lost".

The court put a question yesterday to Schnee: Would he have acted as Bck did ? To this question, which was being put to him expressly as one of the most experienced U-boat commanding officers we have, he has given his answer. He believed that he would have had a chance to escape the present, the immediate and the imminent danger for the boat and the crew. But do not forget that Bck was not an experienced U-boat commanding officer: that he was on his first voyage as a U-boat commanding officer. Do not forget that at this time in which this sinking occurred the battle of the Atlantic had already been won. Do not forget that almost no U-boat could escape the grasp of the Anti-U-boat Warfare. Who can give an answer to the question which has been put to Schnee? The fact that the most experienced U-boat commanding officersin this zone did not return to Germany is against Schnee. Schnee has given his answer in this court. Bck was exhausted from a long voyage through the northern Atlantic. He was at the end of his nerves. He felt impressed by his responsibility for his boat and his crew. He was excited by the chase of the Peleus and of the sinking of the Peleus. In the situation, he took the step with which the prosecution charges him.

What could have held him back from this decision ? Love ?
I think no man of the crew could, as Bck judged the situation and the necessary consequences.

Should the emergency of the survivors have impressed him ?
He had not seen them. I doubt if he would have given and would have stuck to his decision if the sinking had occurred in day time. So on the other side, when he did not see them, when he did not see the misery of the survivors, the thought of his own boat and his own crew, which he believed were in the utmost danger, was stronger. He was not willing to kill any man. He thought over this decision and he fought with it and, when he thought it over, he thought of all the cruelties which have been necessary in this war, he thought of the case of

Hartenstein, he thought of the burning towns of Germany and all the women and children who must have been killed in this war and who were to be killed in this war, something which could not be avoided, but he saw at last no let-out, no other way than to decide in the way that he did decide.

I think that this is a case of emergency. Emergency is a defence which has been accepted since the "Caroline" case. It has been accepted by Westlake, and now it is for the court to decide whether such a man as Eck is guilty or not.

(Dr. Tedeen's speech is interpreted into German).

THE JUDGE ADVOCATE: We will now hear the speech on behalf of Hoffmann. No doubt you wish to address the court on behalf of all the accused for whom you appear ?

DR. PABST: Yes; I will do that now. I wish to read my speech in German and I will then hand it in for translation.

THE JUDGE ADVOCATE: Yes.

(DR. PABST delivers his speech in German, and at the conclusion of his speech it is interpreted into English as follows).

"I am defending the three accused who have acted on the basis of an official order of their commander, namely, the accused; Hoffmann, Weingaertner and Schwender.

"It is not for me to examine whether the action was in accordance with international law or not, and whether it constituted a crime or not, but only the question of whether the order given to them takes the responsibility away from them.

"Regarding the charge which reproaches them with having taken part in the killing of members of the crew of the steamer, it is evidence that, in spite of the prima facie proof which might be applied for war crimes committed jointly, a different treatment of the case must be applied with regard to Schwender. It is not proved that Schwender has shot at any human being or even was willing to do so. Any such prima facie proof has been refuted. If it is proved that Schwender has shot, it is at the same time proved that he only shot at a piece of wood and only intended to do so. He had received the order to shoot at parts of the wreckage. In the moonlight he saw a piece of wood and shot at it. At the same moment the machine gun was taken away from him by Lenz. He alleged undisproved that he would not have shot at human beings, even if he had seen any, as he received no order to that effect. He strictly stuck to the order to shoot at pieces of wreckage and, as he did not notice any human being on or at the piece of wood recognisable in the moonlight and because he was certain that nobody was on or at it, he shot.

"The witness Rauft confirms that when Schwender shot the moon was shining and that he himself did not see any human being and that Schwender only fired a short burst with the machine gun. He further alleges that he had the impression that Schwender shot at a piece of wreckage.

"Schwender, therefore, has neither purposely nor carelessly nor by chance killed anybody. He had convinced himself before his short burst of fire that he could not kill anybody. Therefore, his action cannot be considered a participation in the killing of human beings. If Schwender would be punished, thousands of soldiers would have to be punished who, on order, have shot at non-living targets.

"Regarding Hoffmann and Weinspfennig, it is proved by the evidence that they also have shot on the basis of the given order, whereas, with regard to Schwender, it is proved that he neither intended to hurt nor has hurt any human being by his short burst of fire; at any rate, a prima facie proof to this effect has been confuted and disproved; such a proof cannot be brought about regarding the other two defendants.

"However, they are not already guilty if this proof cannot be brought about, but they are guilty only in case the contrary can be proved to them, that is to say, if it is certain that they actually intended to shoot at human beings and have killed or wounded them. With regard to this point, it is not possible to start from any presumptions, but only from actual facts.

"Even if it should be proved that one or the other of the accused has killed one or several men, this does not imply anything regarding thedegree of his offence. The offence must also be proved. This may be done in different ways, either as purpose, being a dolus directus, or as conditional purpose, being a dolus eventualis, or as careless offence. It is for the court to decide which of the three possibilities is given here.

"It must further be examined if the accused, in case they are found guilty, are to be punished for murder, for manslaughter or for involuntary killing. The difference between murder and manslaughter lies in the question of whether the act was done deliberately or not. It certainly cannot be proved to the accused that the killing of human beings was done deliberately. At least the act was done in a state of excitement which prevented the accused to clearly weigh all circumstances concerned. The crew of the U-boat on this voyage was in a state of continual tension owing to the great dangers connected with it. This, of course, increased considerably at the moment when the torpedoing took place, especially as it was the first voyage against the enemy and the first torpedoing.

"The accused deny to have had the intention or the purpose to kill when executing the order given to them.

"Be that as it may, they are by no means guilty. They both have, as is proved, acted on the basis of a binding order. This order lifts the criminal responsibility from them.

"The soldier is obliged to carry out orders. That is the case in every army. Without this principle an army is unthinkable. It cannot be otherwise, for nowhere the duty to obey is observed so strictly and as a matter of course as in the military service where everything depends upon command and obedience. To disobey a command subjects the soldier to punishment for disobedience. Therefore, the duty to obey excludes every own responsibility. It is impossi_ble to examine the superior's command for its admissibility. The soldier has not to examine whether the order given to him is appropriate, wise, just and permitted. In case he would be allowed such right of examination, every discipline in the army would be shaken.

"As this right of examination is denied to the soldier and as no duty for examination exists for him, the superior alone has the responsibility for his order, even then, if a penal law is violated by the execution. The duty to obey an official order precedes the duty to esteem foreign property.

"This, however, does not mean that there is a cadaver-obedience. The binding force of an order must be limited, for it cannot be approved of if, on the basis of a command of a superior to a subordinate, plain murder is committed. Paragraph 47 of the Militärstrafgesetzbuch, to which the accused were subject at the time of the act and which applies to them even today as long as they are prisoners of war, says: 'If a

penal law is violated by the execution of an order in service, the commanding superior is alone responsible for same. However, the obeying subordinate meets punishment for participating if it was known to him that the order referred to an action which involved a criminal purpose'.

"Therefore, if the subordinate knew that the order aimed at a crime, he is also responsible from the point of view of penal law. According to this, the subordinate must not only be aware of the objective culpability of his action, but also of the subjective criminal intention of his superior, and this knowledge of the circumstances must be proved to the accused by the charge. It therefore does not suffice if the subordinate knows that the execution of the order objectively leads to the committance of a crime, but the subordinate must also know that the superior aimed at a punishable action with the order. The superior must have intended the punishable action and this intention must be known to the subordinate. It is not sufficient that the subordinate was aware of a criminal action and that the superior by his order merely intended such action. Only the positive knowledge of all these circumstances makes the subordinate also responsible. As he is not bound to examine the matter, mere doubts as to the correctness of the order or a careless ignorance regarding the c riminal purpose of his superior do not suffice to establish the penal responsibility of the subordinate. (Compare Reichgericht Strafsachen, 6,140 and 54,337).

"The order to shoot was given. If the purpose of this order was only to murder, then Hoffmann and Weisspfennig are guilty of participating in the murder if it can be proved to them that they knew that the purpose of the order was and only was to commit murder. This is according to German law. Principles have been laid down here which must be the same in all administrations of justice if one will not take away every force from a military order and at the same time undermine or even destroy the discipline of the army of any country.

"Regarding the culpability of a soldier, one must distinguish between the cases in which the subordinate knew the illegality of the order and such in which he did not know it. Only in the former case one can speak of a responsibility of the obeying subordinate; but also in such case the British Military Law will not hold the imprisoned enemy responsible, as is shown in Article 443 Land Warfare. (Compare Manual of Military Law). Also, the English Government recognises the fact that the order of a superior does not make the subordinate responsible, as is shown in the famous 'Caroline' case. In this instance a British vessel had sunk an American one. The British Government demanded the release of those responsible because the action proved to be "a public act, done by persons in her Majesty's service, acting in obedience to superior orders, and that the responsibility, if any, rested with her Majesty's Government". (Compare Pitt Corbett, Leading Cases on International Law, 4th Edition, London, 1922, page 85).

"Also, from the fact that the British Government did not oppose the Reichsgerichts-judgment of June 4th 1921 in the 'Dover Castle' case, it is evidence that it has no objections to make against the principle that the commanding superior alone is responsible and that the subordinate can only be punished if he was aware of the illegality of the order. The matter in question is a Reichsgericht decision according to which a U-boat commander had sunk a hospital ship and was acquitted as he acted on higher orders. This decision does not stand in contradiction to the decision of the same court of 12th July 1921 in the 'Llandovery Castle' case, in which two officers of a U-boat were sentenced to four years prison for manslaughter, because the U-boat had shot at life-boats. Also, in this case the Reichsgericht recognises Paragraph 47 of the Militärstrafgesetzbuch, according to which the superior is responsible and the subordinate only in case he knew that this order constituted an action with the purpose of committing a crime. In this case the Reichsgericht could punish the two officers because it proved that the accused knew that the execution of the order purposed a crime.

"British law, after the changing of Article 443, is regarding the

wording almost and regarding the meaning entirely in accordance with German law when it says "obedience to military orders not obviously unlawful". That means that the order demanded something unlawful and that this demand was obviously unlawful. As an accused can only be held responsible for what he knew, it must be proved here also that he had knowledge of the unlawful character of his action.

"If the Court will not follow the explanations of Dr. Todsen regarding the assumption of a state of emergency, this does not mean that a decision is arrived at regarding the culpability and co-responsibility of the two accused. The accused who have to follow orders as subordinates and who have no right of examination regarding the legality of the order, could not know that the commander by his action purposed a punishable act. They had to be of this opinion the more so as it was their first war-patrol voyage against the enemy. They did not know what secret orders the commander had and if he arrived at his order on the basis of such secret orders for military reasons. If the accused had already made several voyages against the enemy or if they had already sunk several steamers on this first patrol, they surely would have thought more thoroughly about this unusual order. Being their first hostile voyage and the first case of the sinking of a steamer, they did not come to such considerations, but executed the order. They could very well think of all which Dr. Todsen said about the state of emergency and their own peril and the peril in which their boat was. They could be of the opinion that the commander arrived at his own order on the basis of a higher order and that he, for military reasons, had to preserve his boat and crew and had to carry through his battle order.

"In this respect it must be considered that the accused were on voyage already for months and were daily in danger of life. Their nerves were strained to the breaking point. They knew that it was almost impossible to pass the zone in which they were without being sunk. Further, their nerves were strained especially because the order was given in connection with the fighting action and their excitement was tremendous because it was their first success of sinking during their first voyage. All these circumstances, of course, took all clear reasoning away from them. The circumstances were such that the accused had no opportunity for long considerations regarding right or wrong. For them it was a binding order of which they knew that the commander could enforce it by force. It was known to the accused that a refusal of obey in war could have the most serious consequences for them and that each commander on the high seas has the right to prevent refusals of obedience by force of arms. All these considerations discharge the accused to such a degree that there cannot be any co-responsibility on their side.

"The accused deny to have known that the purpose of the order was only murder. They believed in military necessities and in the fact of their own state of emergency. The contrary cannot be proved to them. Therefore, they cannot be punished. The accused must be believed that they did not execute the order for sheer cruelty or lust of murder, but that the considerations and circumstances as outlined by me have made the accused execute the order.

"I therefore ask the court to acquit the three accused. I ask them to acquit Schwender because no punishable act was done by him, and to acquit the other two accused because they cannot be made responsible for the order given to them".

THE JUDGE ADVOCATE: That is the speech on behalf of Hoffmann, Weisspfennig and Schwender.

DR. PABST: Yes.

THE JUDGE ADVOCATE: Do you want to add anything, Dr. Wulf ?

DR. WULF: I adopt what Dr. Pabst has said.

MAJOR LEMMON: May it please the court. We have heard quite a lot of evidence throughout the course of this trial, and a number of witnesses have gone into the box. It will not, I think, have escaped the court's attention that not one witness has gone into the box and stated that any survivors were in fact fired upon. I would remind you that the offence with which these accused are charged, and particularly Lenz, for whom I am appearing, is that they "were concerned in the killing of members of the crew of the SS Peleus by firing and throwing hand grenades at them".

The evidence that the prosecution have brought out to show that the firing was at the survivors is in the evidence produced in the statements of the two surviving Greeks and one Briton. The court may well wonder why these survivors were not brought before this court so that they might be asked questions by the defence and also by the court itself. After all, the prosecution have had fourteen months since the time when these depositions were taken to bring these witnesses before the court.

May I say a few wprds about the question of superior orders. This court is convened to try war criminals under a Royal Warrant. The first regulation under this Royal Warrant says that a war crime means a violation of the laws and usages of war. If that means anything at all, it means that this court is administering international law, and in my submission it is, therefore, analogous to a British Prize Court.

We have heard from Dr. Pabst of the case of the "Caroline"; we have heard of the British Rules of Land Warfare; and it is also pertinent to add the official American doctrine on the subject, "United States Rules of Land Warfare, 1914". I submit that there can be very little doubt that obedience to superior orders is a good defence.

I am well aware that an amendment has been published, the date of which I would draw your attention to, namely, April 1944. That begins by saying: "The fact that a Rule of Warfare has been violated in pursuance of an order of the belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime".

It is my submission that this amendment is not valid for several reasons. As I said before, this court administers international law, and it is analogous to that of a prize court. In that connection, may I refer to the judgment in the case of the "Zamora" (Appeal Cases, 1912(2), page 77), where it states that the Prize Court administers international, not municipal, law, and, although it may be bound by the acts of the Imperial legislature, it is not bound by the Executive Orders of the King in Council. If that is so, then a fortiori this court is not bound by an amendment published by the War Office and, further, this amendment is merely a statement of one writer on the subject of international law in an editionpublished by Oppenheim in 1940. I would refer you to Wheaton, 1944 Edition, at page 586 of which he says: "Common sense indicates that it must be very difficult for officers or men to know when they are committing war crimes and that in any case they act under immediate dread of punishment if they decline to obey orders, so that justice, on the whole, tends to the view that war crimes must not be charged on individuals".

You will recollect that the Treaty of Washington of 1922 had in it a clause to make individual submarine commanders liable as pirates. That treaty was never ratified, because of that main clause, and in fact the later treaty, the Treaty of London 1936, expressly omits that clause. I feel certain that the "Llandovery Castle" ————

THE JUDGE ADVOCATE: Forgive my interupting you, but I am doing so in order that the court may get some help. Just look at the last sentence of this amendment, because I want to know whether you challenge the accuracy of that:

"The question, however, is governed by the major principle that

members of the armed forces are bound to obey lawful orders only and that they cannot, therefore, escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity".

MAJOR LEHMON: I am not prepared to challenge that. I should like, if I may, to refer to the case of the "Llandovery Castle". What I should like to say about that is this: that it has no effect and can have no effect upon this court which is administering international law, because the case of the "Llandovery Castle" was a case decided under municipal law by the municipal court, and that must have been so at the date that the case was tried, because at that date it was a recognised principle of international law, as it has been right up to the time of war crimes, that the proper subjects for international law are states and not individuals, except under certain circumstances - for example, the spies, and treason committed in time of war. But this case of the "Llandovery Castle" was tried in peace conditions. If you hold that superior orders are no defence to an individual, then you are putting in an impossible situation any individual who is subject to military law and to military discipline, particularly any member of the German Wehrmacht. As you have already heard from Dr. Pabst, and as you also heard in evidence, under German law, when on active service, if a person refuses to obey an order, his superior has the right to mete out a death penalty. If you decide that superior orders are no defence, you put the individual into this impossible position, that, if he disobeys the order, he is liable to be shot immediately; if he obeys the order, he is liable to come before a court and be charged on a capital offence with a war crime.

That is all I propose to say to you on the question of international law.

I would now like to come to the particular case of Kapitanleutnant Lenz. You will remember that his evidence was only given yesterday as to what happened on that particular day, 13th March 1944, and I would ask you to try and put yourselves in the shoes of Lenz at the time that the U-boat had sunk the Peleus. The commandant had issued the order. The exact words of that order are in some dispute before this court, but, at any rate, the effect of the order was that the wreckage should be eliminated, with undoubtedly disastrous results to the survivors. That order was repugnant to Lenz. I think there is not the slightest doubt about that. He objected to the commander and said that that order should not be carried out.

How would any of us have acted in that position, if our commander had given us an order which was repugnant to us? Up to that point I think you will agree that Lenz had acted as any normal decent human being would have acted, given that command. The order, after his objection, was re-affirmed by the commander, that all traces of the sinking must be eliminated.

What was Lenz to do ? He could, I agree, have shrugged his shoulders and said: "I am an engineer officer". I admit frankly that he was not given a direct order to take up the gun and fire, as were the others, Schwender and so on. He could have got out of carrying out that order without disastrous consequences to himself by shrugging his shoulders and going back to his engine room. If he had done that, if he had said "Let the responsibility for carrying out this order be placed on other shoulders than mine", he could have done that and gone back to his engine room and he would never have been before this court today.

Lenz did not do that. He has given you his explanation as to why he decided himself to carry out an order which was repugnant to him. You will remember that he had already met one of the survivors and had interrogated him, and he told you in the box that he had a personal feeling, as one would have about somebody one had just spoken to, which

perhaps one would not have if one had never seen any of the survivors and were simply firing at wreckage in the water. He had a personal feeling in regard to the survivors. He had known this man Schwender for some time as being a most unsatisfactory sort of person, and he tells you that he decided in his own mind that, if any one of the survivors was going to be shot at and possibly killed or if, as the result of shooting at the wreckage, anyone was going to be killed, that person should not be killed by a man like Schwender.

I think that later the learned judge advocate put to the accused a very reasonable question. He said words to this effect: "What earthly difference does it make to a person who is shot at whether the Archangel Gabriel himself or the Devil shoots at him?". It makes no difference. There is no doubt that in our eyes Lens's action is difficult to understand. But you have heard him in the witness box. You will realise that this is not something that he had made up for his defence recently; he gave that as his reason as far back as June 1944, and in Lens's eyes it did matter very much who it was who did the shooting.

Let me take, if I may, perhaps an unfortunate and maybe gruesome example to make this point abundantly clear to you. Suppose that Lens is facing a firing squad, you may say it makes no difference to Lens who are the people that compose that firing squad, and that may well be so; but in Lens's eyes it makes a very big difference as to whether the people in the firing squad are men of honour or a band of ruffians. It makes a very great deal of difference to him.

If you accept, as I think you must accept, that explanation of Lens, because there is no other explanation of his actions which makes sense, if this order was repugnant to him, as it quite evidently on the evidence was, why should he go out of his way and take the trouble to take up the gun and carry out the order himself ? That does not make sense unless you do accept and see through the eyes of Lens himself his reason for taking up the gun and firing it. I think you will agree that, if that is true. Lens knew perfectly well that this order was being carried out; in fact Schwender had already fired shots; Hoffmann and Weissprennig had already thrown grenades. There was no possibility of Lens preventing the order being carried out once it had been given and, after he had objected and the order had been re-affirmed, there was nothing further he could do about preventing the order being carried out.

I would refer you to the very significant remark of Lens in cross-examination, in which he says in answer to a question, I think by the learned prosecutor, as to why he was firing: "The order was just being carried out and that was why I fired". You will remember that there was no possibility of the order not being carried out then. If I may say so, Lens's motives in then taking up the gun were by no means base motives; they were motives really of a man of honour; and I ask you to say that.

I think there is very little more I can add. You will be advised, I am sure, by the learned judge advocate as to the question of the burden of proof in this case. It is definitely on the prosecution to prove their case; it is not for the accused to prove their innocence.

When you are considering whether you have a reasonable doubt, you will, I am sure, bear in mind the accused's good character and give the benefit of that character to the accused. I ask you, gentlemen, for a verdict of not guilty against this man, Kapitanleutnant Lens, in view of his actions during this time.

THE JUDGE ADVOCATE: Do you want that translated ?

MAJOR LEMMON: No; Lens does not want it translated.

COL. HALSE: May it please you, sir. Both last night and to-day we heard arguments on international law and whether this court was right in trying war crimes, and what power they had to try a war crime.

If I may deal first of all with the question of war crimes themselves, as I see the position war crimes have been in existence for many years. If you read any of the books on international law, and the Manual of Military Law, which is before this court, one can see that there was a code of chivalry produced during the 14th and 15th centuries, which eventually came into use as a code of war, a code by which fighting soldiers waged war. As we changed from bows and arrows to muskets, and from muskets to rifles and submarines, various alterations were made in that code, but the code remained.

In the case of the "Llandovery Castle" itself the Supreme Court of the German Reich said in their judgment - and I will read from page 55 of Command Papers of 1921, No.1450 - "The firing on boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed. Compare the regulation as to war on land, paragraph 23. Similarly in war at sea the killing of shipwrecked persons who have taken refuge in lifeboats is forbidden." There the court of the country in which we are now sitting decided that it was a war crime to kill survivors of ships. In my submission there there can be no question that this court is entitled to try these five accused persons for the very charge which was in fact before the court in the "Llandovery Castle" case. The regulations for the trial of war criminals merely provides the way in which war criminals will be tried; that is to say, they set out the rules of procedure and also provide for the punishment which can be meted out to war criminals under the regulations.

The learned professor yesterday referred to the maxim of Nullum crimen sine lege, nulla poena sine lege. In my submission that is only applicable to municipal and state law, and could never be applicable to international law.

Passing from there to the discussion which we have had already on superior orders, that proviso, if it applies at all, can only be applied to the accused Hoffmann, Weisspfennig and Schwender. It cannot apply in my submission, for reasons which I will show you in a moment, to either Eck or Lenz.

We again look to see whether you could use a plea of superior orders, to the very same case of the "Llandovery Castle." There the German court decided that the two members of the crew of the U-boat who were acting under the orders of their commander, committed a war crime in firing at the boat, because they were doing something which was illegal, and that court decided that if an order is given which is, in itself, illegal, there can be no defence of superior orders. In my submission here there can be no defence of superior orders by Hoffmann, Schwender and Weisspfennig, because the order which was given by Eck was an illegal order, as held by the court of this country.

Those are briefly the points which I wish to make on the law, and I want to be equally brief with regard to the facts of the case. They are not in dispute. It is admitted by everybody that the "Peleus" was sunk, that the survivors took to the water and got on rafts, and that these five accused in the dock fired at those rafts, in four cases knowing that there were survivors, or expecting survivors to be on the rafts or the wreckage. It may be different in Schwender's case, but in the other four cases Eck ordered it and the other three fired and threw hand grenades at those rafts.

So far as Eck is concerned, he has told you that he decided to eliminate all traces of the "Peleus" by firing at the rafts, and he said he did that for the safety of his crew. He called on his behalf a very eminent U-boat commander, a man who has to his credit thirty Allied ships. That man said that he would never, in Eck's position, have fired at these rafts; he had got a good many hours of darkness still with him and he would have made off at once to get away from the sinking, and he would not have surfaced round the rafts trying to destroy them by gunfire or by grenades. He said that Eck lost his head; that may be an answer. There was Eck, the first time in command of a U-boat, having sunk his first ship in command - he had sunk some more before - and he does this act which is pointed out by two of his officers as being something that should not be done. He still sticks to his guns and orders fire to be opened. In my submission that man must be guilty of the charge as preferred. He admits in evidence he knew there must be survivors on the rafts. I suggest to you that that is cold-blooded murder.

Hoffmann also fired - he admits it - and he threw hand grenades. You have heard the affidavits of the survivors and you have learned that one of the persons who died on board those rafts was hit by hand grenades. Hoffmann says he was the only person who threw hand grenades. Subject to your decision on superior orders, I submit the case against Hoffmann is fully proved.

Perhaps the strongest facts in this case are those alleged against Dr. Weissgfenning. Dr. Weissgfenning has the protection of a medical officer under the Geneva Convention. He is treated differently when he is a prisoner of war. If he is moving with a Red Cross truck he is not fired on. Here is the man who from the very first starts opening fire on rafts on which he has seen lights which had been put out - a deliberate firing on rafts which he knew had survivors on board. In my submission his case is made the worse by reason of the fact that he is of the medical profession, and has no right to bear arms at all, except, as we know, against savages and persons who are not in the same position as white men who fight in this war.

Passing now to Lenz, Lenz objected to this order, and so did another member of the crew who was killed when the U-boat was captured. Lenz objected to this order, but despite his objection the order was carried out. Lenz did not want to have anything to do with it, and he took the opportunity of going below decks to write up the report of his interrogation. It was not four or five hours later when the beating-up and the shooting-up of the survivors was still going on, that Lenz comes on deck and he sees a man on whom he has got a "down" because he thinks he had an illegitimate child, firing in the direction of some wreckage. At the same time he hears from the bridge that there is a human form on the wreckage. He pushes Schwender to one side and opens fire in the direction of the target, as he said in his statement.

There is a man who objects to the order and then deliberately fires in the direction of a human form which is stated to have been on some wreckage. How he can plead to this court that he acted under superior orders is beyond the comprehension. Be that as it may, I would suggest that he is equally guilty, and the suggestion which he makes, that he does not want a man killed by a soldier who in his view is bad, appears to me to be an absurd one.

Now, Schwender is in a curious position in this case. Schwender is the only rating involved. It may be that he was only involved

because he happened to be coming on the bridge when the captain saw another target, it may be that he had been taking part in this action for some time, but there is no doubt that Schwender did fire in the direction of wreckage, and he must have known, in my submission, in the confined space of the submarine, that they were firing at human targets which were in the water, hoping to be rescued, as they had been told they would be by Hoffmann on the next day.

I have not gone a great deal into the evidence, because you have heard it all, and it is obviously not contested. I accept the responsibility, as I must do, that the onus of proof is on me to satisfy you beyond all reasonable doubt that these accused have committed the offence contained in the charge sheet which is before you. I should like to point out that there is no legal ruling required in this case as to whether it was murder or manslaughter. These accused are charged with killing - being concerned in the killing of survivors of the ship in violation of the laws and usages of war as accepted by decent nations all over the world.

THE JUDGE ADVOCATE: Do any of you desire that that speech should be read over and translated? If you do, it shall be done.

DR. TODSEN: Might it be translated?

THE JUDGE ADVOCATE: Yes, certainly, it will be done.

(The closing address for the prosecution is read over and translated into German, down to the paragraph ending "I suggest to you that that is cold-blooded murder.)

DR. TODSEN: The case for the prosecution, as far as Eck is concerned, has been translated. I think that the other accused are not interested in the translation. Perhaps we can stop it here.

THE JUDGE ADVOCATE: You do not want it translated, Dr. Pabst?

DR. PABST: No, I do not.

DR. WULF: No.

(At 1240 hours the court is closed)

SUMMING-UP

THE JUDGE ADVOCATE: It is now my duty to sum up in this case, and in a few minutes it will be the duty of the members of the Court to say whether or not each of these accused persons is guilty of the offence with which he is charged.

Let me begin by reminding you of the language in which the accusation against them is expressed in the charge-sheet: "Committing a war crime" - and I draw your particular attention to those words - "in that they in the Atlantic Ocean on the night of the 13th/14th March, 1944, when captain and members of the crew of Unterseeboat 852 which had sunk the Steamship 'Peleus' in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, allied nationals, by firing and throwing grenades at them".

It is desirable, I think, that I should remind you once more that you are sitting here as a Court convened in pursuance of a Royal Warrant which says this: "We deem it expedient to make provision for the trial and punishment of violations of the laws and usages of war committed during any war in which we have been or may be engaged at any time after the 2nd September, 1939".

The regulations which are made for the purpose of carrying out the trial of war criminals provide that 'war crime' means a violation of the laws and usages of war committed during any such war as is referred to in the Warrant. It is from that warrant that you derive your authority to sit here, and that the officer who convened this Court is entitled to convene it.

You are concerned here to decide whether or not there has been a violation of the laws and usages of war. During the course of this case you have had to listen to much discussion about international law. Let me at the very outset of my summing-up suggest that you should be in no way embarrassed or put out by the alleged complications of international law which it has been suggested surround such a case as this.

International law is nothing but a body of rules which have been expressed in treaties, or else of customs or usages which express the common sense of civilised nations, and all those rules and usages are based on the dictates of ordinary humanity. It is a fundamental usage of war that the killing of unarmed enemies is forbidden. It is forbidden as a result of the experience of civilised nations through many centuries. To fire so as to kill helpless survivors of a torpedoed ship is a grave breach against the law of nations. The right to punish persons who break such rules of war has equally been recognised for many many years. There is no difficulty or complication about it.

You in this case have got to decide whether each of these accused was, in the language of the charge, concerned in the killing of members of the crew of the said steamship, the Peleus by firing and throwing grenades at them. That charge is expressed in simple language. You do not need any advice or help from a lawyer in interpreting that language, and you probably will not need much advice or help in applying it to the facts that have been put in evidence before you.

Let me remind you once more of what ought to be the starting point of your consideration of this case, the principle of international law which is expressed in this case to which so much reference has been made, the "Llandovery Castle". Whatever may be said by those who are interested for or against the so-called Leipzig Trials, no one so far as I know has ever challenged the accuracy of the principle which is expressed in the judgment of the Supreme Court of Germany in that case. That, as you have heard already, was a case where a hospital ship was torpedoed and a case where the officer and crew

of a German submarine fired on survivors in boats.

The principle is stated in the judgment in the following form: "The firing on the boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed". Then there is a reference to the Hague Regulations, and it continues: "Similarly, in war at sea the killing of shipwrecked people who have taken refuge in lifeboats is forbidden." My advice to you is that you are entitled to take that statement of the principle as the starting point of your investigation of this case.

Now let me remind you of two principles that are fundamental in British justice. The first is one to which reference has already very properly been made. It is not for the accused in such a case as this to prove that they are innocent; the law is the contrary. The prosecution have got to prove that they are guilty. They have to establish their guilt beyond a reasonable doubt. Mark those words, "a reasonable doubt". A reasonable doubt does not mean some fanciful or imaginary doubt such as a weak mind may grasp if it is struggling to avoid an honest conclusion on evidence that is plain. It means the kind of doubt that might affect you in the conduct of some important affair of your own. If, having considered this case as I know you will, most anxiously, you are left with a reasonable doubt such as I have described, then it is your duty to give to any accused person as to whom you entertain such a doubt the benefit of it and to acquit him.

If, on the other hand, the evidence that you have heard drives your minds to the conclusion that he is guilty, it is equally your duty to say so without regard to the consequences of the finding.

The next general observation I want to make is this. Each one of these accused persons has given evidence on his own behalf. He need not have done so but he chose to do so, and by so doing he exposed himself to cross-examination. It is sometimes said by members of Courts who have to consider the evidence of accused persons: "Well, he, after all, is only the accused. We cannot pay very much attention to what he says because he is certain to distort his evidence in his own favour". That would be an entirely wrong frame of mind in which to approach the evidence of any accused person. You must give to it the same consideration as you would give to a witness called for the prosecution. That does not, of course, mean that you are bound to accept everything that he says; you may indeed in assessing the weight that you think it right to attach to his evidence remember that he is the accused and may therefore have a substantial motive to colour his testimony in his own favour; but it would be utterly wrong if, just because he is the accused, you were wholly to discard his evidence. Give to it all the weight that you think you properly can, and if there is an interpretation of it which is in his favour rather than against him, then adopt the more charitable construction.

Let me also add this. Each one of the accused in this case is a German. He is entitled in this Court to just as fair treatment at your hands and just as much consideration as if he were a citizen of any allied nation. When you are approaching any of the problems which you have to consider in this case and the thought enters your mind, as it no doubt will, that the accused concerned is a German national, pause to ask yourselves whether that fact is relevant to the question that you have to decide. It may be relevant; on the other hand it may not be relevant. You must be careful, and I know you would be anxious, to give to each one of these men the consideration which any accused person is entitled to receive in any British, or in any properly constituted international Court of justice.

So much for the frame of mind in which you must approach the decision of this case. Now let me very shortly draw your attention to the facts. You have listened for some days at great length to a lot of detailed evidence about the events of the night of the 13th/14th March 1944 which are referred to in the charge-sheet. It is now some time since you heard the evidence of the prosecution. I do not think in this case that it is my duty to go through

again the mass of evidence that has been called before you because most of that evidence is fresh in your minds; but let me put before you in order that we may have it immediately in front of us for the purpose of discussion the salient facts which emerged from the prosecution's evidence here.

You will remember the statement of Antonios Cosmas Liossis, who was the chief officer of the S.S. Peleus. You will remember how he described the sinking and what he said about the events which followed it. He described how the submarine came up to the third officer's raft, and he goes on to say: "The submarine left the third officer's raft and made a sweep. I could see most of the rest of the crew in the water, clinging to wreckage and shouting and blowing whistles. We all called to them and told them that we were coming to help. We lashed two rafts together and very soon after the submarine re-appeared and hailed us to go nearer. As we approached the submarine suddenly opened fire with a machine gun. We all ducked and I could hear cries of pain from Constantinides who was hit by bullets in several places. The rafts were riddled with bullet holes but they did not sink because the tanks were filled with buoyant material. The Germans also threw hand grenades at us, one of which wounded me. My head was under a bench so that I was only hit in the right shoulder and in the back. They also threw grenades at the other raft. The Germans on the submarine were shining their signalling lamp to see that every-one was finished off but I lay very quiet and as my back was covered with blood I think they decided that I was dead. The submarine made its way to the float-ing wreckage and kept on firing big bursts from their machine guns; later firing was intermittent.

"Just before dawn the submarine went away and I found that Constantinides was dead. I was joined by the third officer who had fallen from his raft into the sea and had been hanging on to my raft. He was very badly wounded in the right arm from bullets. As many sharks had gathered round the wreckage and we did not want to see Constantinides eaten we waited until nightfall to throw him overboard."

That was followed by a similar account from another survivor, Bruce Isbell, who described the torpedoing and went on to say: "The ship sank immediately and soon after the submarine surfaced and began to machine-gun the men in the water and ram the wreckage. I saw men throw up their hands and sink, and rafts turn over. The submarine left the vicinity at dawn on the 14th March. At about 1600 on the 14th March I got on to a raft on which I found a Chinese fireman who had been a member of the crew, he was lying dead and had injuries to his face and chest, from the explosion of grenades." He then failed to remember his name, and he continues: "I climbed on and helped Dimitrios Argyros to climb on as well. The raft was much damaged by the explosion of hand grenades and machine-gun fire. We stayed on this raft the whole night and next day until at about 1800 we found another raft in much better condition to which we transferred. No one was on this raft. Six days later we found another raft on which were the 1st officer and the 3rd officer.

"I found that the 3rd officer was suffering from a broken arm caused by the explosion of a hand grenade. I helped to nurse him and took splinters from a hand grenade out of the wound. He died 25 days after the sinking of the Peleus from gangrene and yellow fever."

There are the facts as the prosecution set them out on which the charge in this case is founded.

You have had before you certain members of the crew of the submarine 852 who were called to corroborate the evidence given by those survivors. It is indeed an unfortunate fact that it has not been possible to bring before you the people who made those affidavits in order that you might have seen them in their proper persons before this Court. However, that has apparently not been practicable and you have to content yourselves with what is stated in the affidavits that I have just read.

If those facts stand by themselves, is it not reasonably clear that the

accused, who were members of the crew of the submarine who either ordered the firing of machine guns or in fact took part in the firing of machine guns, have a formidable case to answer?

Now let us pass to the consideration of what those answers are. Let us look at the case which has been set up by each one of the accused. Let us first take the commandant, Kapitanleutnant Heinz Eck. It is not disputed that he ordered machine guns, pistols and hand grenades to be brought up on the deck and that he gave the command to fire.

As he now says, the purpose of that firing was primarily the destruction of wreckage in order that every trace of the sinking might be obliterated. He says he realised that a consequence of the carrying out of that order must have been the death of certain survivors and that it was a decision that he regretted; but he says - and this is a matter which you have got to consider with great care - he was under an operational necessity to do what he did because he had as his first duty to ensure that the submarine was protected against attack by allied aircraft. He says that the only way of doing that was to take every possible step on that night to destroy every trace of the sinking. If as a result of that survivors were killed it was unfortunate for them but he was under the paramount necessity of protecting his boat and his crew.

Do you think that that is a defence that may reasonably be true in fact? If you think that it may reasonably be true in fact, if you think that those were the motives operating in his mind, you would then have to consider whether this so-called operational necessity could in any circumstances afford a defence to a war crime such as Eck is charged with.

The question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life has been the subject of much discussion. It may be that circumstances can arise - it is not necessary to imagine them - in which such a killing might be justified; but I suggest to you that you consider this case on the facts which have emerged from the evidence of Eck. Remember he cruised about the site of this sinking for five hours. He refrained from using the speed which was at his disposal of 18 knots to get away as quickly as he could from the site of the sinking. He preferred to go round shooting, as he says, at wreckage by means of machine guns. Do you or do you not think that the shooting of machine guns at substantial pieces of wreckage and rafts would be an effective way of destroying every trace of this sinking? Do you or do you not think it fairly obvious that in any event a patch of oil would have been left after this steamship had sunk which would have been an indication to any aircraft that was in the neighbourhood that a ship had recently been sunk and that a submarine was probably in that area and it was well worth searching for it?

Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Capt. Schnee, who was called for the defence, said he would have done, namely have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance?

All those are matters for you to consider. It is indeed a fortunate fact that this Court includes naval officers of long experience. They will be able to assess the value of these facts. They will be able to make up their own minds as to the importance of each one of the considerations which I have mentioned, and it may well be that other considerations will occur to them as relevant to this case that are unlikely to enter the mind of a layman at any time.

There is, of course, another view which the prosecution suggest, that here was a commander exhausted and over-strained by many days of cruising under the sea on this painful and inconvenient passage, who found himself with an opportunity at last of destroying several allied nationals, several members of

enemy nations who he no doubt regarded as responsible for the discomfort he had just undergone. The prosecution suggest that with that opportunity in front of him and seeing these unfortunate people struggling in the water, he took the opportunity to fire in circumstances which he well knew must result in their death.

All those are matters for you to decide. It is for you to say what conclusion you come to upon those facts.

Let it be observed that the commandant, Eck, does not rely upon the defence of superior orders. He stands before you taking the sole responsibility of the command which he issued upon himself.

Let me now turn to Leutnant-zur-See August Hoffmann, the second accused on the charge-sheet. Again it is quite clear that this officer Hoffmann did fire. He says: "I fired on the rafts. The commandant gave me orders; he gave orders directly to me. I have the responsibility for weapons on board". Then he made this observation which you may think is a very significant one: "Now I am sitting here I do not think it was right to fire as I did". There is the accused Hoffmann saying, "My real excuse for what I did was that I received an order to fire from the commandant, Eck".

That brings me to the discussion of an important issue in this case, namely the effect of what has been called superior orders, that is to say orders coming from a higher authority which the accused is by the law and custom of his Service obliged to obey. We can start with this quite clear proposition: The duty to obey is limited to the observance of orders which are lawful. There can be no duty to obey that which is not a lawful order. You have, therefore, to make up your minds whether the order to do something against which there was a clear prohibition such as I drew your attention to in the early stages of this summing-up was a lawful order.

Let me draw your attention once more to the statement of the law to which Major Lorman referred earlier. The fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime, neither does it confer upon the perpetrator immunity from punishment by the injured belligerent.

Undoubtedly a Court confronted with a plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience of military orders not obviously unlawful is a duty of every member of the Armed Forces, and that the latter cannot in conditions of war discipline be expected to weigh scrupulously the legal merits of the order received.

The question, however, is governed by the major consideration that members of the Armed Forces are bound to obey lawful orders only and that they cannot therefore escape liability if in obedience to a command they commit acts which both violate well-established rules of warfare and outrage the general sentiment of humanity.

It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done; but is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was

not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?

You, and you alone, are the judges in this case, and you have got to make up your minds about that. That question of superior orders constituting a defence in such a case as this affects each one of the accused other than Eck.

I do not think it would serve any useful purpose if I went through the evidence which Hoffmann gave. I have drawn your attention to what I think are the outstanding characterization of it. I will return to the topic of superior orders when I deal, as I shall do a little later, with the defence of Lenz.

Let us now, following on I am the order of the accused in the charge-sheet, deal with the case of Weispfennig. There again Weispfennig says: "I was ordered to shoot and I did shoot in pursuance of that order". He admitted in the witness box that he being a medical officer was exempted by the regulations of the German navy from using weapons for the purpose of offence. He enjoys all the privileges which doctors enjoy under international law in relation to the Fighting Services of any country. He certainly knew of the exemptions which he enjoyed under the regulations of the particular service to which he belonged. Yet, knowing that, Weispfennig fired with a machine gun in the circumstances of which you have heard. It is for you to say what you think about it. He says: "I got a direct order from the commandant. I did not know there were people on the rafts."

How much importance do you attach to the statement which has been made, not only by Weispfennig but others in this case, "I did not know that there were people on the rafts; I did not see people on the rafts"? Is it not fairly obvious that the lights on the raftswhich they ordered to be extinguished must have satisfied them that there were people on those rafts? It is entirely for you to say.

That brings me to the case of Lenz, who was the engineer officer of this submarine. The first fact, as Major Lennon has pointed out on behalf of Lenz, which strikes one so forcibly and so prominently is that Lenz was minded to protest at the order which the commandant gave, and did in fact protest at it, telling him that he did not agree with it.

You may think that an interesting fact because it must have been quite obvious to Lenz that the order which was given was an order to do something that was wrong - to use most neutral language. But having made his protest, having gone below and busied himself with the writing of a report of the interrogation which he had made, and as you may think, having got himself out of the way of the commandant and out of this slaughter that was going on above, he then comes up on deck.

Here we come to what is perhaps the most extraordinary piece of evidence in this case, a piece of evidence which you may think reveals some of the odd qualities of the German mind, and a piece of evidence that it is very difficult for those who are not of the German race to understand. He saw Schwander using the machine gun. He pushed him away and he fired it himself, fired it as he says, in order that there might be no question of a person to whom he had recently been speaking, meaning one of those who had been interrogated, being killed by a bullet fired by the hand of such an undesirable person as he believed Schwander to be. That, you may think, is a very odd explanation indeed. Whether it is true or not, you may still think that Lenz might fall within the description in the charge-sheet of a person concerned in the killing of members of the crew of the steamship, because he voluntarily took upon himself at least the possibility of killing somebody on one of these pieces of wreckage, or on a raft.

It is for you to say what you think about it. It is for you to say how much importance is to be attached to the fact that he did make that

protest, whether it can provide him with a complete answer to this charge.

That brings me to the case of Schwander, of whom it is said he fired only twice, and there again he, like the others, is relying upon the defence of superior orders. He was a member of the crew; he was a rating on this boat. I want to draw your particular attention to the position of the members of this crew. You will remember the evidence that the commandant after this happening observed that the members of the ship's company were in what was described as a bad mood, a mood so bad that he thought it necessary to administer to them what can be called in popular language a 'pep talk'. Why do you think they were in that state of mind? Do you think it was because they all knew perfectly well that some enemy them had been concerned in doing something that was obviously wrong, something that in the language that I read to you just now outraged the general sentiment of humanity? Do you or do you not think that Schwander in these circumstances is a person who can be excused for firing because he received that order to do it?

So much for the cases for and against the respective accused. You have heard a suggestion made that this Court has no right to adjudicate upon this case because it is said you cannot create an offence by a law which operates retrospectively so as to expose someone to punishment for acts which at the time he did them were not punishable as crimes. That is the substance of the latin maxim that has been used so much in this Court. My advice to you is that that maxim and the principle that it expresses has nothing whatever to do with this case. It has reference only to municipal or domestic law of a particular state and you need not be embarrassed by it in your considerations of the problems that you have to deal with here.

Now let me say one word about my own functions in this matter. My duty here is to advise you and nothing more. If in the course of what I have said I have at any time permitted it to appear that I have formed an opinion about this matter, you are at liberty completely to disregard that opinion, because you have to decide this case upon your own judgment. If, of course, anything that I have said appeals to you as common sense there is nothing to prevent you adopting it and acting upon it, but you are in no way bound by anything I have said.

It will be of satisfaction to you that each of the accused in this case has been so well defended by such able and resourceful advocates. You know that everything that could properly be said on their behalf has been said, and well said, by their respective counsel.

Let me end by urging you to pay all the attention you think right to what has been said on their behalf. Having done that let me now ask you to decide this case.

No doubt the defending advocates would like that translated, would they?

Dr. TODSEN: The accused are following it.

THE JUDGE ADVOCATE: Very well.

(At 1508 hours the Court is closed)
(At 1548 hours the Court is re-opened)
(The accused are again brought before the Court)

THE PRESIDENT: Kapitanleutnant Heinz Eck, the Court find you guilty of the charge. Leutnant zur See August Hoffmann, the Court find you guilty of the charge. Marine Stabsgefreiter Walter Weissenfeldt, the Court find you guilty of the charge. Kapitanleutnant (Ing) Hans Richard Lenz, the Court find you guilty

of the charge. Gefreiter Schraeder the Court find you guilty of the charge.

THE JUDGE ADVOCATE: Dr. Todsen, do you wish to address the Court in mitigation on behalf of Eck?

Dr. Todsen: Yes. In my plea in mitigation I would start with the case of the Llandovery Castle because I think if the Court has to pass sentence it is a good thing to compare different cases which have occurred. I will mention the Llandovery Castle case in a few words. As far as I know in the Llandovery Castle case a German U-boat had sunk a hospital ship. The U-boat commander had suspicions that on this hospital ship there might be troops. Then he had sunk the ship he surfaced and he saw the crew in the lifeboats. He hailed one of the lifeboats to his U-boat and he asked them whether his suspicion was correct or not. When he got the information that his suspicion was not correct and he knew quite well that in sinking the hospital ship he had committed a war crime, and when he knew that, and perhaps for two reasons he tried to kill all the survivors.

One of these reasons may have been that he thought that by sinking the ship he might have done a great damage to Germany, and the other reason, and I think it was the main reason, was that he tried to eliminate all traces of his evil doing. I think that was a more selfish reason, and I certainly think that what he did was a very serious crime.

I have tried to show to the Court that in the case of Eck there is a very big difference and that he did not act from selfish reasons when he decided to destroy the rafts.

The second point is this. I have to come back once more to the evidence of Schraeder, for I am afraid that the Court has not got the point I wanted to make. Schraeder was asked whether he would have acted like Eck did, and certainly Schraeder said "No", and then Schraeder was asked if he saw any chance of getting right away from the scene of the sinking during the night, and to this question he said, "No". What Schraeder could not tell the Court was the way to get out of the trouble in which Eck found himself.

In deciding the sentence I beg the Court to lay stress upon this point: from the very beginning Eck has at no time tried to escape his responsibility. It was suggested to him that he might have acted under superior orders but he denied that he did. On the other hand he never denied that he had given the order to his crew and he tried to take all the responsibility on himself. A man who has acted like this is not very likely to have acted on bad instincts in the case with which he is charged now. I think that he acted as he did because he saw no other way out.

Should such a man be eliminated because he committed a fault when under great strain? When Eck acted as he did he acted in war time. The Court does justice in the name of humanity and the Court does it in peace time.

THE JUDGE ADVOCATE: Do you wish to call any witness of character?

Dr. TODSEN: No.

THE JUDGE ADVOCATE: Dr. Feist, do you wish to address the Court in mitigation on behalf of all your clients?

Dr. FEIST: No, not in the case of Hoffmann; Dr. Wulf is speaking on his behalf, and I am speaking on behalf of Wolfenstetter and Schraeder.

Dr. WULF: I have two witnesses as to character.

THE JUDGE ADVOCATE: Then will you call them.

Dr. MEYN is called in, and having been duly sworn, is examined by Dr. Wulf in German, his evidence being translated as follows:-

Q You are Dr. Meyn? A. Yes.

Q How do you come to know Leutnant Hoffmann? A. I was his teacher for five years.

Q What special capabilities did you notice about Hoffmann? A. I noticed right from the start his special German character.

Q Did you also notice that he was particularly helpful? A. Yes, I noticed that particularly because he took care of one pupil who was rather awkward and who through that habit often got into conflict with his fellow pupils. He took a special interest in that pupil, and that particular pupil in the course of one year became a decent member of the school community.

Q Was this only one particular instance, or was Hoffmann always helpful? A. He was always helpful.

Q Is that the reason why he was elected leader of the class? A. Yes, that was the reason.

Q Later on, after Hoffmann had left his class, and later still when he had become a soldier, did you meet him then? A. I met him on several occasions. He came to see me in the class and at my home, and we often talked about personal and military matters; and two or three years ago I particularly noticed that he said to me that a soldier should in the first place see the human being in his enemy. We very frequently talked about those human problems and this thought always has been in the forefront of our discussions. Apart from that, he was a soldier and a soldier only and did not care about politics in any way. As far as I knew Hoffmann he always lived on a Christian basis and kept away from all other influences; in short, he was always a soldier only.

Q Do you also know his parents? A. I have known his parents for the last fifteen years.

Q Do you know anything about how his parents brought up their son? A. They brought him up in a Christian and non-political manner.

Q What impression did you get from the parents? A. I have only the very best impression from the parents; the best one can get of parents.

Col. HALSE: No questions.

(The witness withdrew)

DOBENECKER is called in, and having been duly sworn, is examined by Dr. WULF in German, his evidence being interpreted as follows:-

Q You are Dobenecker? A. Yes.

Q How did you come to know Hoffmann? A. I met Hoffmann as he was ordered on board our ship.

Q How long were you together with Hoffmann? A. I was together with Hoffmann from December 1942 until March 1943.

Q What did you particularly notice about Hoffmann? A. Hoffmann was a particularly helpful, good tempered comrade.

Q Could you tell the Court anything about his helpfulness towards comrades or subordinates? A. I can remember one instance where he taught and instructed a canteen officer who could not get on in his job.

Q What else do you know about that? What particular trouble did he take over it, and also towards others? A. He was always just towards his subordinates. He never bullied them and he always tried to get along without disciplinary action. I had the feeling that in all his subordinates he saw the human being.

Q Did you also talk to him once about how to act when faced with the enemy? A. Yes, I can remember that in the enemy he only saw the opponent who like us fought soldier against soldier.

Q Did you also talk to him about the carrying out of orders? A. Yes. He was of the opinion that for a German officer it would be the worst deed not to carry out an order even if it meant going against his own will and judgment.

Col. HALSE: No questions.

(The witness withdraws)

Dr. WULF: I would like to put one question to Hoffmann himself.

THE ACCUSED, Lieutenant zur See AUGUST HOFFMANN, again takes his place in the witness box and is further examined by Dr. WULF in German, his evidence being translated as follows:-

THE JUDGE ADVOCATE: Hoffmann, you have already been sworn.

Dr. WULF: Can you give us the date of the day when you saved somebody's life? A. Yes. On the morning of the 3rd May 1944 our boat had run ashore unmanoeuvrable near the coast of Somaliland. The crew tried to get to the shore by means of a rubber dinghy. I myself went with four other heavily injured comrades in a dinghy. Suddenly planes appeared and fired at us with machine guns. We all jumped into the water. I heard cries of 'help' from one comrade, Obergefreiter Dum. I also knew that he was wounded. I swam towards him. He was exhausted and clinging to one of the dinghies but could not get into it. As I was wounded myself and had great pain in my legs and my legs below the knee were paralysed, it was rather difficult for me. It is probable that Dum would have been drowned if I had not saved him.

(The accused leaves the place from which he has given his evidence)

THE JUDGE ADVOCATE: Dr. Wulf, do you wish to address the Court in mitigation?

Dr. WULF: Can I do that in German?

THE JUDGE ADVOCATE: Yes.

Dr. WULF: I have a faithful translation which the interpreter can afterwards read.

THE JUDGE ADVOCATE: Very well.

(Dr. Wulf addresses the Court in German and a translation of his address is then read by the interpreter as follows:-

Dr. WULF: I have to plead for Lt. Hoffmann at this stage of the proceedings. Generally speaking the same plea which my learned colleagues have put forward on behalf of the accused defended by them also applies to Hoffmann.

In this sense therefore I also stick to what my learned colleagues pointed out in regard to Hoffmann.

In addition to that I wish to point out the following facts on behalf of Hoffmann:

At the time of the incident, Hoffmann was 21 years old, that is to say he was still very young. It was his first patrol, and his first sinking too. He faced this absolutely new and unknown situation for the first time. Naturally, he was extraordinarily excited. In addition to this came the exhaustion in consequence of the extremely strenuous duty in the crowded U-boat in the tropical zone, the lack of sleep, the great head and the bad air condition.

After the sinking he now was of the opinion that rescue had to come to the shipwrecked persons, which was in accordance with his whole attitude of chivalry towards the enemy. That is why he informed them accordingly. More so he was surprised to hear the order of fire.

He therefore tried at first to avoid the execution of the order.

But when thereupon the machine gun that was served by Weinspfennig got a stoppage he felt himself obliged for the second time, in his capacity as artillery officer to fulfil the order. The duty of an officer to obey prevailed, especially as he knew that the refusal to obey could be punished by immediate shooting by the commander, particularly at independent and cut-off units such as U-boats.

As he had complete confidence in the commander, he was convinced that the commander acted only on military grounds and that the commander had instructions or orders to destroy the wreckage etc., which order served to secure the boat against dangers such as discovery from the air, especially as five boats had not returned from this area.

That Hoffmann only thought of this can be seen from the fact that he proposed to the commander to use the 3.7 gun in order to destroy the wreckage. Only when this was rejected too, he threw the hand grenades by order.

That according to his whole personality and his inner feelings the accused Hoffmann detested cruelties with all his heart is proved by his entire education at home and by his descent from respectable and honourable people. That he has been a decent, modest man, always ready to help, is seen by the fact that he had devoted himself to life-saving. He had already acquired the certificate of life-saving when he was a young schoolboy.

As the most decent fellow in the class, he had been appointed monitor of the class because he particularly cared for those weaker boys who could not find contact with the other boys and therefore were teased by larger boys. In the same way as a soldier and officer he interested himself especially in his subordinates and always pointed out that the enemy also must be considered just as fairly. In this way all his life he was ready to help others and to fulfill his duty.

The best example of this is that after the sinking of his own boat, in spite of serious wounds during enemy fire, when they were trying with other comrades to get to the coast on a raft, he jumped out of the boat and in spite of a serious wound he saved the life of M-Obgefr. Dumm, who was about to drown and was shouting for help, by helping him to get on to a dinghy and in consequence of weakness was almost drowned himself.

I am of the opinion that all these facts must be taken into consider-

stion in determining the punishment, and accordingly the accused Hoffmann can only be punished by imprisonment.

THE JUDGE ADVOCATE: Dr. Pabst, do you want to address the Court, or call evidence?

Dr. PABST: I do not wish to call evidence but I wish to address the Court.

THE JUDGE ADVOCATE: This is on behalf of Weisspfennig and Schwender?

Dr. PABST: Yes.

(Dr. Pabst addresses the Court in German and a translation of his address is then read by the interpreter as follows:-

Dr. PABST: If regarding the question of guilty or not guilty you could not consider the given order as a ground of justification or a ground of excluding the guilt, you must take it into consideration when fixing the puhishment.

You must let your mind swerve away from these documents and from the mass of light in this room to the open sea, the fight and the dark night. You must switch from the large room in which we are sitting here to the narrow measures of a U-boat, the hurrying and bustling in it, the discipline, and the noise which is there occasioned by the running of the engines. You must think of the mental state in which the accused were and of the tension of their nerves which were strained to the utmost during the two months journey away from home and in continual danger of life.

I am glad that the proceedings take place before a Court which is filled only by war-experienced officers and in which the Navy is strongly represented. You will therefore be able to judge this case better than any other Court, the judges of which would be lacking in front-line experience.

When the accused received the order to open fire it was impossible for them to disobey. This could not even come to their mind. Used to obey, should they refuse obedience to their commander, who was an example to them in many ways? It would have been equal to mutiny if officers and crew of the boat had resisted the order. The U-boat would have been done for. It could just as well have sunk itself or could have gone home because the discipline on the U-boat would have been undermined by the refusal in such a way that the U-boat would have completely lost its character as a fighting force.

A refusal to obey the commander on a U-boat would have been such an extraordinary matter that it can readily be understood and is human if the accused could not make up their minds to do that even if they had wished to do so. The pressure of military authority under which they have acted, and the habit of obedience from which they could not get away, justifies to a high degree the granting of mitigating circumstances.

I mentioned already that I am glad the Court is made up of officers. Just those will be able to answer the question correctly: should the accused commit mutiny against the commander, and should Matrose Schwender also take part in it?

If the accused are sentenced they can only be sentenced on account of their faithfulness to their commander and on account of their comradeship to one another. They have jointly risked their lives daily and hourly. Jointly they have stood the hard tasks which were continually put to them. Jointly they now stand before you and declare: "We have not acted from cruelty or lust of murder but faithful to our soldierly duty to execute the orders which we received. If we have failed, then it is certainly not on account of bad will or any faults of character but because practically there was no

other way for us to act.

Major LERMON: May it please the Court. I shall be very brief in this plea of mitigation. You have already heard what I had to say about Lens's motives in taking the gun away from Schwender and I will not go into that again; I am quite sure that you will pay the greatest regard to his motives when you come to consider his sentence.

I ask you to say that Lens was in a different position in this case from any of the other accused. He objected to this order, and it is only his certainly illogical but nevertheless not unchivalrous and highly romantic reasoning which induced him to take away the gun from Schwender which has brought him before you to-day on trial for his life.

I ask you to say that Lens did not commit this crime out of any sordid motives of gain, or any lust of cruelty. You will, I think, have appreciated that fact from the examination and cross-examination of Lens in the witness box. I ask you also to take into consideration his good character up to date and the fact that he has, like all the other accused, been in captivity and had this case hanging over his head for a very long time now.

I would ask you to show the world that British justice, though stern and just, is nevertheless tempered with mercy.

THE JUDGE ADVOCATE: Do you want that interpreted?

Major LERMON: No.

THE PRESIDENT: The Court will now retire to consider these sentences.

(At 1635 hours the Court is closed)
(At 1733 hours the Court is re-opened)
(The accused are again brought before the Court)

THE PRESIDENT: The findings and sentences of this Court are subject to confirmation.

Kapitanleutnant Heinz Eck, the Court sentences you to suffer death by shooting.

Leutnant zur See August Huffmann, the Court sentences you to suffer death by shooting.

Marine Stabsarst Walter Weisspfennig, the Court sentences you to suffer death by shooting.

Kapitanleutnant (Ing) Hans Richard Lens, the Court sentences you to suffer imprisonment for life.

Gefreiter Schwender, the Court sentences you to suffer imprisonment for fifteen years.